Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 221.

ROLLINSON COLBURN ET AL., APPELLANTS,

vs.

ROBERT E. GRANT, EXECUTOR, ET AL., APPELLEES.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Brief for Appellants (Complainants Below).

STATEMENT OF FACTS.

This is an appeal from a decree of the Court of Appeals of the District of Columbia affirming a decree of the supreme court of said District which dismissed the bill in equity filed by appellants for an account.

The bill was filed by the legatees of Augustus G. P. Colburn and their trustee, Franklin H. Mackey, against the executor of the estate of George Fitz James Colburn, a deceased trustee of the estate of said Augustus Colburn, for an accounting, it being alleged that there had come into the

hands of said trustee and his cotrustee, both of whom were deceased, a large sum of money, viz., $28,000, and that only $5,000 thereof had been accounted for. The codefendants of the defendant executor are those persons who would be entitled to distribution of his testator's estate. Answers were filed denying liability to account, and thereafter the case was heard upon the pleadings and an agreed statement of facts. The complainant claimed that defendant's testator had been negligent in the administration of the trust, and that his estate was liable to make good the deficiency. The court dismissed the bill, and on appeal the decree of dismissal was affirmed.

From the admitted allegations of the bill and the "Agreed Statement" the following facts are conceded and make up the case upon which the decision of the court is asked:

That on the 27th day of May, 1872, Augustus G. P. Colburn, of the city of Newark, New Jersey, departed this life in said city, leaving his last will and testament, dated May 25, 1872, whereby he devised to his son, George Fitz James Colburn, for and during his natural life, a certain dwelling-house and lot in said city, with power to the trustees named in the will, to wit, his said son, George Fitz James Colburn, and John W. Taylor, to sell the same, and the proceeds to invest and the interest to pay to said George Fitz James Colburn during his lifetime; that in case of the death of his said son without issue the income should be paid to his widow if she survived him, and after her death to the brothers and sisters of said Augustus G. P. Colburn for and during their natural lives, and in case of the death of any of them after his decease, then such income was to be paid to the survivors of said brothers and sisters equally, and upon the death of all of his said brothers and sisters the principal so invested was to go to and vest in the children of his brother, Hervey Colburn. An exemplified copy of the will is made part of the bill, marked Exhibit A. (See printed Record, p. 5.)

That said George Fitz James Colburn died on the 21st day of September, 1897, in the city of Washington, D. C., unmarried and without issue, his wife having predeceased him; that all the brothers and sisters of said Augustus are dead, having predeceased George Fitz James Colburn, except Miranda Kimball (sister of Augustus), who died about three months after said George Fitz James Colburn; that the complainants Rollinson Colburn and Edward A. Colburn are the only surviving children of said Hervey Colburn, brother of the testator.

That said Taylor (one of the trustees under the will of Augustus Colburn) died in the year 1893, and that said George Fitz James Colburn died testate on the 21st day of September, 1897, leaving the defendant Robert E. Grant as his executor, who has duly qualified.

That the trustees, Colburn and Taylor, were named as trustees of the will for the management of the trust, and that they gave no bond for the faithful performance of the trust; that the real estate was shortly after the testator's death sold by them for $27,000, which was paid, part in cash and the remainder in subsequent installments, which were collected by Taylor; that George Fitz James Colburn moved from Newark in 1873 to the city of Washington, D. C., where he resided, except for a few months, up to the day of his death.

That Taylor "was a prominent lawyer of the city of Newark at the time of his appointment and continued so to be up to the date of his death, in the year 1893, and that he was regarded by the general public as a man of business integrity at the time of his death, by his own hand, on the 20th of November, 1893."

"That after the death of Taylor it was found that he had squandered many estates under his custody, amongst others, the said estate of Augustus G. P. Colburn, except the sum of $5,000, which was under the exclusive control of the said George Fitz James Colburn, and which latter sum of $5,000

has been turned over by the executor of said George Fitz James Colburn to said Franklin H. Mackey, trustee, by order of this court in equity cause 18728.*

"That the said trust estate, except the said sum of $5,000 referred to, was by the said George Fitz James Colburn *left solely to the collection, management and discretion of the* said Taylor, who handled said sum, *without the co-operation, supervision or knowledge* of the said George Fitz James Colburn, the latter only requiring from said Taylor *the payment of the income* of said estate to him said George Fitz James Colburn as provided by the will."

It is also conceded that, after the death of Taylor, George Fitz James Colburn, as surviving trustee, "made claim against the estate of said Taylor for $22,000, the amount of the trust fund by him squandered, as aforesaid, and upon said claim a dividend of $3,342.42 was paid, and that by a paper-writing this sum was released by the plaintiffs, ex-

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* The following is a copy of the decree appointing the trustee in equity cause 18728, it having been omitted by inadvertence from the transcript of the record, but read by consent of counsel in the Court of Appeals:

Copy of Decree Appointing Franklin H. Mackey Trustee.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

ROLLINSON COLBURN ET AL. vs. ROBERT E. GRANT ET AL. } In Equity. No. 18728.

This cause coming on to be heard upon the pleadings, exhibits, and stipulation as to evidence, and having been argued by counsel for the respective parties, and it appearing to the court that the trustees under the will of Augustus G. P. Colburn are both deceased—

It is by the court, this 15th day of December, A. D. 1898, adjudged, ordered, and decreed that Franklin H. Mackey, Esq., be, and he hereby is, appointed trustee under the said will, with all the power and authority by said will heretofore vested in said deceased trustees, upon condition, however, that before undertaking the performance of said trusts he file in this court a bond, with surety to be approved by the court, in the sum of ten thousand dollars, conditioned upon the faithful performance of said trusts.

(Signed) W. J. COX, *J.*

M. 53, p. 467.

cept Miranda Kimball, to said George Fitz James Colburn to enable him to purchase an annuity for himself, which he did, and enjoyed it until his death."

The prayers of the bill are for an accounting and for a decree "against the said Grant as executor of said estate of George Fitz James Colburn * * * for so much of the estate of the said George Fitz James Colburn * * * as may be justly payable to complainants or any of them by reason of his, the said George Fitz James Colburn's, liability incurred as trustee of the estate of Augustus G. P. Colburn aforesaid."

As stated, the bill was dismissed and the case is now here on the following

ASSIGNMENT OF ERRORS.

1st. That the court below erred in dismissing the bill.

2d. That it erred in refusing to grant the prayers of the bill.

3d. That it erred in finding as matter of law that the estate of George Fitz James Colburn was not liable for the deficiency in the estate of Augustus Colburn.

4th. That it erred in finding as matter of law that said Colburn was not guilty of any such negligence or default in his administration of the trust estate as would render him liable *de bonis propriis.*

BRIEF OF ARGUMENT.

For the express purpose of presenting the evidence clearly and well defined, the parties to this cause, through their counsel, agreed upon a "Statement of Facts," and one of the first things of which we have to complain is of the action of the court below in going beyond that agreed statement to

find other supposed facts in the answer of the defendant executor. His answer was called for without oath, the oath being expressly waived, and consequently could not be evidence except in so far as it admitted the allegations of the bill or contained admissions against interest. Had we known that the court would have regarded the allegations of this answer as evidence, notwithstanding the stipulation of counsel, we would have had the right to rebut these allegations by other evidence; but, relying, as we had the right to do, upon the well-known rule that, where parties have stipulated what the evidence is, the court will confine itself to the facts contained in the stipulation and the admissions of the parties in their pleadings, we took no other testimony. Now, if a court may ignore the stipulation and bring into the case other alleged facts, which by reason of the stipulation we did not deem it necessary to rebut, it is plain that the plaintiffs are *entrapped* by the court into a position which neither of the parties to the controversy contemplated. Such procedure is equivalent to deciding the case upon *ex parte* testimony, and no greater injustice could be done than that.

Believing that this supreme tribunal will, in making up its judgment, confine itself to the "Statement of Facts," supplemented with such allegations of the bill as are admitted by the answer, and also such admissions in the answer as are against interest, we proceed to consider the case from the plaintiff's standpoint.

We quite agree with the court below in its statement that "the principles of law [governing this case] are simple enough." But we deny the correctness of its statement that "the controversy is one of fact," for there is no such controversy. There are no disputed facts before the court whatever. Every fact upon which the court is to apply the law is conceded by the "Statement of Facts" or the admissions of the parties.

These facts so conceded are:

1. That Augustus G. P. Colburn died in Newark, in the State of New Jersey, May 27, 1872, leaving the will set forth in the record (p. 5).

2. That the parties in interest are as stated in the agreed statement and the bill.

3. That Taylor and George Fitz James Colburn were appointed trustees of the property devised by the will, and that neither gave any bond.

4. That the dwelling-house referred to in the eight paragraphs, respectively, of the bill and answer was sold by the trustees for $27,000 shortly after the death of the testator.

5. That the net proceeds of said sale "was paid part in cash and the remainder in subsequent installments, the latter installments being collected by the said Taylor" (Rec., p. 11).

6. That, of this sum, $5,000 was placed under the "exclusive control of the said George Fitz James Colburn" (Rec., p. 11).

7. That the said trust estate, except the said sum of $5,000 referred to, was by the said George Fitz James Colburn left *solely to the collection, management, and discretion* of the said Taylor, who handled said sum without the co-operation, supervision, or knowledge of the said George Fitz James Colburn, the latter *only requiring* from said Taylor the payment of the income of said estate to him, said George Fitz James Colburn, as provided by said will.

8. That George Fitz James Colburn removed from said city to Washington, D. C., in 1873, where he resided, except for a few months, up to the day of his death.

9. That Taylor continued to reside in Newark, was a prominent lawyer there at the time of his appointment as trustee, and continued so to be up to the date of his death, and that "he was regarded by the general public as a man of business integrity at the time of his death by his own hands on the 20th of November, 1893."

Note, from the fact that he was a "*prominent lawyer* and regarded by the general public as a man of *business integrity*," the court below states that he was "held in high esteem," a fact that was not admitted, and that the Agreed Statement scarcely justifies, since men may be believed to possess "business integrity" and yet not be held "in high esteem." The only argument that can be drawn from this finding is that it is a supposed justification of Colburn in abandoning the trust to Taylor's discretion, but, we submit, it affords no such justification.

10. That on the death of Taylor it was found that he had squandered many estates in his custody, including the estate of Augustus Colburn.

11. That a dividend of $3,342.45 upon his claim of $22,000 against the estate of Taylor was paid to Colburn, the surviving trustee, which sum he was permitted by the parties in interest to invest in the purchase of an annuity.

12. That George Fitz James Colburn died in Washington in September, 1897, and that only the sum of $5,000 of the estate of Augustus Colburn has been turned over by his executor to the new trustee, Franklin H. Mackey.

The foregoing are, as we have said, the material and conceded facts of the case. The *law* raised by them being, as the court below said, "simple enough," must therefore also be conceded, and it is, to formulate it briefly, as follows:

A trustee is personally liable who, retaining his position as trustee, turns over the greater part of the proceeds of sale

of the trust property to his unbonded cotrustee, who squanders it when it appears that for nearly twenty years the negligent trustee left the money to the sole handling, management and discretion of the defaulting trustee, neither co-operating with him nor supervising in any manner his dealings therewith.

It is the duty of a cotrustee, who desires to retire from any participation in the management, control of and supervision over a trust fund (neither of the two trustees being bonded) to tender his resignation to the court in order that a new trustee may be appointed in his stead, or that security may if necessary be required of the remaining trustee, the necessity for a bond being greater where there is only *one* trustee than where there are two or more.

These two propositions of the law of trusts are abundantly sustained by the authorities. Indeed, the court below cites with approval practically the same propositions, in the following language, on page 22 of the record:

"Cotrustees may not act independently of one another, nor ignore each other in the management of the trust. The trust is entitled to the united judgment, *discretion* and ability of all the trustees selected. For this reason they may not delegate discretionary powers among themselves."

Then, as to the establishment of the fact of the abandonment of discretionary power over the trust by one of the trustees to his cotrustee, the court says on page 24 of the record:

"Abandonment of discretionary power by a trustee to his cotrustee is a fact to be proved by him who alleges it, and so likewise is negligence in the supervision of the trust."

We find no fault with the proposition as to the burden of proof, but we submit that when it is stipulated as matter of fact between the parties that the trustee sought to be charged "left" the entire estate "solely to the collection, management, and *discretion*" of the cotrustee we have discharged our-

selves of the duty of offering any other proof of "abandonment of discretionary power by the trustee to his cotrustee,' and especially so when we follow up this by pointing to the conceded fact that the negligent trustee permitted the defaulting trustee to "handle" the fund "without the co-operation, supervision, or knowledge" of the negligent trustee, who "only required" the defaulting trustee to pay him the income of the estate, he being the life tenant, thereby showing that where his own interests were concerned he was diligent, but with the interests of those who were to enjoy the estate after his death he did not concern himself—*apres moi le deluge.*

What stronger proof could we offer than the admissions of the defendant? By those admissions we show that the negligent trustee, from 1873 to 1893, a period of twenty years, left the fund "solely," viz., entirely, to the "discretion" of his cotrustee, entirely to his "management" and to his "handling"—gave him no "co-operation," no "supervision," and sought no "knowledge" of the fund nor of his cotrustee. If this is not "abandonment" of a trust, we should like to know what it is. And yet in the face of these damning admissions the court below says, "We cannot infer delinquency on the part of Colburn when there was no more proof than is contained in the record, that by his abandonment or by his negligence in the supervision of it *he had put it in the power of his cotrustee to prove faithless in his duty!* If leaving to an unbonded cotrustee the entire and sole discretion, management, supervision, handling and knowledge of the fund without the co-operation of the negligent trustee for a period of twenty years is not "putting it in the power of the unbonded cotrustee to prove faithless to his duty," we should like to know what conduct short of criminal connivance is necessary on the part of a cotrustee in order to hold him liable for negligence in such a case.

In summing up the conclusions of the court the learned justice, delivering the opinion, says:

"If the real estate which originally constituted the trust fund had remained unsold, and no duty had been imposed upon the trustee, Taylor, other than to collect the rents and to remit them to Colburn in Washington, and this duty had been left exclusively to him, we do not think it would be reasonable to infer from this fact alone that Colburn had abandoned the trust; and yet in that contingency this would have been the only duty to be performed under the trust, except the payment of taxes and insurance, and all this would necessarily have been under the supervision of Colburn and subject to his approval and ratification in the acceptance of the rents remitted to him. When the real estate was sold and the proceeds invested or reinvested, did any different condition arise?"

The answer to this question would seem very plain. In the first place, *before* the real estate was sold Colburn could very well have left the mere collecting of the rents and payment of the taxes to Taylor. There was in that no danger of the *corpus* being lost. Taylor could not dispose of real estate without Colburn's signature to the deed, and therefore the remaindermen were perfectly safe, no matter how far away or how negligent in surrendering to Taylor the management of the *income* of the trust estate Colburn may have been. But when he joined with Taylor in the sale of the *corpus* a different situation at once arose. The *corpus* took on a different form. It had changed from real estate to *money* and this money Taylor, if faithless to his trust, could at any time have appropriated to his own use unless watched by Colburn. It was this money which Colburn, according to the Agreed Statement of Facts, "left *solely* to the collection, handling, management, and discretion," for twenty years, of a co-trustee, who had given, as Colburn well knew, no bond as security for its forthcoming when wanted. The defendant admits that his testator not only did this, but permitted Taylor "to handle said sum [money] without his co-operation, supervision, or knowledge," his only requirement being that Taylor should pay him the interest thereon, but leaving

the investment of it, if it ever was invested, to Taylor's "discretion."

Again the learned justice speaks of the real estate being sold "and the proceeds invested and reinvested," and a little lower down on the same page (24) he says:

"It does not anywhere appear that after having been once invested there was ever need or occasion for reinvestment. Indeed, it may reasonably be conjectured that the amount remained as a mortgage on the property sold, and inasmuch as there is nothing to show that such mortgage was ever paid and that the proceeds were reinvested, it would not be unreasonable to assume that the investment remained as it was first placed."

Surely this conceded "conjecture" and "assumption" could hardly be more at variance with the stipulated and admitted facts. By turning to that stipulation, on pages 10–11 of the record, we find that so far from its justifying the assumption that "the amount [viz., the purchase price] remained as a mortgage upon the property." The purchase price "was paid part in cash and the remainder in subsequent installments, the latter installments being collected by Taylor."

"It does not anywhere appear," says the court, "that after having been once invested there ever was need or occasion for reinvestment." "But," we ask in turn, "where does it anywhere appear that it ever was even *once* invested"? *Quod non apparentibus et non existentibus eadem est ratio.* We are far more justified in "conjecturing" or "assuming" that after it got into Taylor's hands it was never invested. Indeed the very admission of the stipulation is that it was "squandered," together with other funds in his hands. A man does not "invest" what he "squanders," and does not squander what he invests. All this "squandering" arose from Colburn's abandonment of the fund to Taylor. As Colburn knew that Taylor was not under bond, and knew that having left the money *solely* to the latter's *handling, manage-*

ment and *discretion*, without any *co-operation* or *supervision* on Colburn's part, he could not but have known that he had placed it in Taylor's power to prove faithless to his trust. What more could he have done to make it easier for Taylor to "squander" the fund without his, Colburn's, knowledge?

When a trustee is shown to have thus abandoned the trust to his cotrustee for nearly twenty years, is not the burden of proof at once shifted to him, or to those who seek to discharge his estate from the consequences of his conduct, of showing some excuse for such conduct? Does the fact that Taylor's reputation with the "general public" was that of a man of "business integrity" justify an abandonment of the trust fund to him? Nowhere is it shown that Taylor was a man of financial responsibility; and, if it were so shown, that fact would constitute no justification; nor is it shown that Colburn was a man of no experience, or that he was in ill health, or that any matter or thing required or compelled him to thus completely give up the trust to Taylor's keeping and discretion. The learned justice delivering the opinion of the court quotes from 2d Story's Equity, section 1280, that "trustees are only responsible for their own acts and not for the acts of each other, *unless* they have made some agreement by which they have engaged to be bound for each other, or they have *by their own voluntary co-operation or connivance enabled some one or more of them to violate the trust.*"

There is no dispute about this as the law. This trust was in the form of real estate when the trust was created. Did not Colburn, by co-operating with Taylor in turning it into money, and then turning over the money to Taylor to "handle," without security or supervision, leaving it "solely" to his "management and discretion" for nearly twenty years, to do with as he pleased, "enable him to violate the trust"?—a thing which Taylor was unable to do so long as the *corpus* stood in the form of realty.

II.

But it is claimed that these contingent remaindermen, some of whom were children at the time and some yet so as the record shows, and, as the record also shows residing, one in Pennsylvania, one in the District of Columbia, one in Massachusetts, and one in New York, had—thus scattered over the country as they were—imposed on them the duty to watch Taylor. It was their duty, we are told, to know what he was doing, and therefore they cannot complain of their trustees' negligence, or of the negligence of the cotrustee. Surely this is not the law, and it needs no argument to refute it. It is doubtful whether as contingent remaindermen they would have had the right to interfere, even had they known the facts; but, whether that be so or not, the testator had placed these interests in charge of two trustees, and surely neither of them can escape the consequences of their negligence or default by saying that the contingent remaindermen should have watched them and complained sooner, especially when they do not appear to have had any knowledge of the facts, being widely separated from the trustees and from each other. This trust existed for nearly a quarter of a century before the event happened, upon the happening of which the contingent remaindermen were to enjoy it. It was an event that in the nature of things would not be likely to happen until many years had elapsed, and it was an event which might never have happened; and yet these widely separated parties, some of whom were not born when the trust property was sold, are to go without remedy because their trustee silently and voluntarily abandoned the trust which it was his duty to watch over.

III.

There remains but one other point to be noticed. It is claimed by the defense that because some of these contingent remaindermen signed a paper called in the record "a release" of all claims to the sum of $3,342.45 "received by him (Colburn) from his father's estate," therefore they have acquitted the releasee of all further demands. That is to say, if A owes B two dollars, and B releases his claim for one of the dollars, he thereby loses the right to demand the other dollar. An examination of the language of the paper itself will show the absurdity of such a pretension. There was no consideration whatever for its execution. It was a pure gift and could not even today be legally enforced, were the money in existence to be claimed. It is only because of the fact that it was paid over to third parties in consideration of an annuity on the belief that such a paper authorized such use of it, that the signers of the paper are estopped from now claiming that the testator's estate should account for it.

IV.

WHAT THE AUTHORITIES SAY.

"All the trustees must act in dealing with the management of the principal or capital of the trust" (Perry on Trusts, § 416, and cases cited). *Prima facie*, they are responsible and liable therefor (*ibid*). It is recognized that it is practically impossible for every trustee of several to actually attend every detail of administration, as where a business is being carried on, or a bond is to be collected by one trustee, or money is put into the hands of one to be paid away; or where a fund was given to three trustees, one in London and two in Cornwall, to build an alms-house in London, it was held that the fund was properly in the hands of the trustee in London, and that during the construction of the alms-house the others were not answerable for the loss of part of it by his insolvency (Perry Tr., § 417, and cases

cited). Here there were reasonable excuses for the innocent trustees, and no negligence was imputed to them.

"But a trustee is not excusable for not exercising a general superintendence and care over the trust (Perry on Tr., cited).

"Even a direct provision in the deed of settlement that trustees shall not be liable for the defaults of their cotrustees does not excuse them from this general care and superintendence and from 'the duty of intervening, if they hear any fact tending to call for their intervention; nor will it justify them in paying over the money to the sole credit of one trustee, and generally it will not authorize them to do any acts which would be a breach of trust if such clause was not in the deed or will (Perry on Tr., § 417, and cases cited).

"So if the will contemplates the joint action and joint liability of all, they cannot excuse themselves if they accept the trust (Perry on Tr., § 417, and cases cited).

"A trustee is guilty of a breach of trust if he does not exercise due care and diligence (Perry on Tr., § 418).

"Thus, for example, if he suffers money to remain in the hands of his cotrustee, however competent and responsible, longer than is necessary (*ibid.*, Brice *vs.* Stokes, 11 Ves., 319, &c., &c.).

"So, trustees must ascertain the condition of the funds at all times within which a reasonable man should ascertain the condition of his own property; as where a mortgage to three trustees had been paid off, and the money came to the hands of one, and was invested in bills and notes of the East India Co., payable in two years, and these were paid into the hands of the same trustee to whom the mortgage had been paid, and the acting trustee asked to have the money remain in his hands on a mortgage to be given; and it so remained for a year, no mortgage being executed, the other trustees taking no active steps for several years to know the actual condition of the trust fund; this was held to be a breach of trust, and they were decreed to make good the loss" (Perry Tr., § 418, and cases cited).

"A trustee is bound to inquire and ascertain for what purpose a cotrustee desires the money; what investments he proposes to make, and what securities he proposes to take, and he must take pains to see that the proposed investments are actually made (Perry Tr., § 418, note and cases cited).

"There is an actual or constructive breach of trust if a trustee acquiesces in his cotrustee's retaining the money in his hands unnecessarily (Perry Tr., § 419, note 4 on page 506, citing 4 Beas., 427, &c.).

"If a trustee receives the trust fund or part of it, and pays it over to his cotrustee, who wastes it, he will be liable for it (Perry Tr., § 419, p. 507, note 7), or if he is guilty of any negligence or want of reasonable care" (*id.*, note 8).

In the case at bar both trustees joined in the execution of the power of sale, each receiving part of the trust funds, by mutual consent. There is no question of either joining for *conformity;* this division of the trust fund was unlawful, especially as neither looked one to the other's acts of administration, and thus each became liable for the other's default, if any; for this mutual agreement amounted to the same thing as each receiving a portion of the trust and paying it over to the other's exclusive control.

It is held that if trustees join in executing a power of sale, and one receives the money, all must be held answerable if it is lost by the one that receives it (Perry Tr., § 420, p. 508, and cases cited in note 1).

In the case of *executors*, all who join are held responsible (Perry Tr., § 421, and cases cited). So if an executor joins in executing a power of sale (as in the case at bar) given in the will he will be responsible for the appropriation of the proceeds, though his co-executor receives all the money (Perry Tr., § 421, and cases cited).

An executor is responsible for knowing how the funds in the hands of his coexecutor are disposed of. (Perry Tr., § 423, and cases cited.)

If there are several trustees they must act jointly (Martindale on Conveyancing, § 317).

A trustee is prohibited from leaving the control of his trust estate to his cotrustee (Adams Equity [58]). For when several trustees are appointed the property is committed to the charge of all, and the *cestui que trust* is entitled to the vigilance of all (Adams Eq. [58]; Snell Eq., 147, pt. 2, ch. 6).

Cotrustees are bound to know the receipts and watch over the conduct of each other (Ringgold *vs.* Ringgold, 1 Har. & Gil., 11).

In matters requiring the exercise of discretion by trustees and not in mere ministerial acts, cotrustees must all join and cannot act separately in discharge of their trust (Vandever's Appeal, 8 W. & S., 405).

Similarly it is held that it is not sufficient, to exempt one of the two joint trustees from liability, that the duties of the trust have been exclusively performed by the cotrustee, with the concurrence and consent of the former. On the contrary, he is responsible for the conduct and management of his cotrustee to whom he has thought proper to delegate his power, in the same manner and to the same extent as if they had been executed by himself.

Maccubbin *vs.* Cromwell, 7 Gill & J., 157.
Spencer *vs.* Spencer, 11 Paige, 299.

So when, by the act of one trustee, a portion of the trust fund gets into the hands of his cotrustee, they are both responsible therefor (Graham *vs.* Davidson, 2 Dev. & Bat. ch. 155).

In a mere ministerial act, such as the receipt of moneys during the administration of the trust, an act not involving nor calling for the discretion of the trustees, one trustee may properly allow his cotrustee to receive the same, but he will be liable if he improperly allows it to stay in his hands. (See Adams Eq. [58].)

Even innocent trustees can be held for a default of a cotrustee, where the cotrustee cannot be reached by reason of insolvency or the like. (See Adams Eq. [59], note.)

"Trustees cannot delegate this authority. The office of a trustee is one of personal confidence, and cannot be delegated. A trustee, therefore, unless expressly authorized by the instrument of trust, cannot delegate or transfer, or intrust, in whole or in part, his powers of discretion and

management to any associate, subordinate, or assistant who takes his place and assumes his responsibility. If he does so he remains liable to the beneficiary, and is chargeable for all acts and omissions of his delegate, and with all losses, whether occasioned by the latter's fraud, neglect, want of good faith, or other cause" (Pomeroy's Eq. Jur., § 1068, and cases cited).

"As a trustee cannot delegate his authority to a subordinate, so on the same principle *he cannot idly yield or surrender the entire control of the trust property and exercise of the trust functions to his cotrustees, when he is associated in the trust with others,* * * * the beneficiary is entitled to that security and protection which results from the care, oversight, and co-operation of all the trustees."

"If, therefore, a trustee virtually abandons his active functions, neglects to interpose in the management, and leaves the whole control to his cotrustee (as it is conceded Fitz James Colburn did), he will be liable for losses occasioned by their wrongful acts or neglects" (Pomeroy's Eq. Jur., § 1069, and cases cited).

"The rule is firmly settled that where a breach of trust has affected two or more or all of the cotrustees with a common liability, they are liable jointly and severally; each is liable for the whole loss sustained or the whole amount due, and a decree obtained against them jointly may be enforced against any one of them" (Pomeroy's Eq. Jur., § 1081, and cases cited).

Where one trustee permits a cotrustee to receive trust funds without making due inquiry as to his dealing with it he renders himself liable. (See Pomeroy's Eq. Jur., § 1082.) It thus appears that the consent to a cotrustee's breach of trust need not be expressed; it may be implied from the trustee's conduct in refraining from taking reasonable and necessary steps to prevent or repair the loss (*id.* and cases cited).

It is submitted that the decree should be reversed and the cause remanded with directions to grant the prayers of the bill.

FRANKLIN H. MACKEY,
Solicitor for Appellants.